CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

August 5, 2004

Call to order: Chairwoman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:49 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairwoman Randolph, Commissioners Philip Blair, Sheridan Downey, Pam Karlan, and Tom Knox were present.

Item #1. Public Comment.

Louise Masaki, from Corona, said she understands that the Commissioners cannot comment on pending cases, however, she wanted to make comments on behalf of herself and her business associate Jack Wyatt. For 18 months, they have been investigating conflicts-of-interest regarding two City of Corona Councilmembers. The District Attorney has forwarded a case to the Commission, and Louise has additional material to present to the Commissioners in light of that case. She asks that Commissioners look through the material and contact her for any assistance, as the material is rather convoluted. Ms. Masaki gave the materials to Executive Director Mark Krausse.

Consent Calendar

Commissioner Karlan recused herself from voting on item #6.

Commissioner Blair moved approval of the following items:

Item #2. Approval of the June 25, 2004, Commission Meeting Minutes.

Item #3. In the Matter of Elaine Griffin, FPPC No. 03/257. (2 counts).

Item #4. In the Matter of Arthur J. Johnston, III, FPPC No. 2004/178. (6 counts).

Item #5. In the Matter of Sarah Reyes, Friends of Sarah Reyes, and Gustavo Corona, FPPC No. 02/429. (31 counts).

Item #6. In the Matter of Eric Perrodin, Committee to Elect Eric Perrodin and Thomas Barclay, FPPC No: 01/175. (1 count).

Item #7. In the Matter of MedImpact Healthcare Systems, Inc., FPPC No. 03/579. (1 count).

Item #8. In the Matter of Pacific Spanish Network, Inc., FPPC No. 02/1043. (3 counts).

Item #9. In the Matter of Diane-Meyer-Simon, FPPC No. 03/580.

Item #10. Failure to Timely File Late Contribution Reports – Proactive Program.

a. In the Matter of George Garrick, FPPC No. 2004-142. (1 count).

b. In the Matter of Andrew Littlefair, FPPC No. 2004-148. (1 count).

c. In the Matter of Sigue Corporation, FPPC No. 2004-155. (1 count).

Item #11. Failure to Timely File Statements of Economic Interests.

a. In the Matter of Stephen Kellogg, FPPC No. 03/229. (3 counts).

b. In the Matter of Diana Peterson-More, FPPC No. 03/442. (1 count).

c. In the Matter of Margaret Briare, FPPC No. 04/027. (1 count).

d. In the Matter of Berchard Shipley, FPPC No. 03/740. (1 count).

e. In the Matter of Bridget Silva, FPPC No. 03/725. (1 count).

f. In the Matter of Debra Steward, FPPC No. 03/726. (1 count).

Commissioner Downey seconded the motion.

Commissioners Blair, Downey, Karlan, Knox, and Chair Randolph voted, "Aye." The motion carried by a 5-0 vote for all consent items except item #6, which carried a 4-0 vote with Commissioner Karlan not voting.

Item Removed From Consent

There were none.

Item #12. Adoption Discussion of Proposed Regulatory Action to Address General Plan Decisions: Amendment of Reg. 18704.2 (Direct/Indirect Involvement).

Commission Counsel Natalie Bocanegra commented that when the commission last considered this matter in May, staff proposed regulatory language for step 4 and step 7 of the conflict-of-interest analysis to address the general plan issues. After hearing discussion on this language, the commission rejected step 7, "the public generally exception" approach, and asked that staff bring the step 4, the "direct/indirect involvement" step, language back for adoption. Staff recommends adoption of the proposed regulatory language.

Commissioner Karlan complimented Ms. Bocanegra on her work on this. She had a language suggestion on page 3, line 14, to add the word "instead" after the words "but is" in order to make it clear that it is one or the other. Also, Commissioner Karlan suggested that on the next page, subdivision (c), line 12, to pull out the word "or" on line 13 through the word "equivalent" on

line 15 and make it a new subdivision (d) so that the definition is separate from and immediately after the thing it is defining. This might make it more comprehensible.

Chairman Randolph said it would be fine with her.

Commissioner Blair moved to approve the amendments to regulation 18704.2. Commissioner Karlan seconded.

Commissioners Blair, Downey, Karlan, Knox, and Chairman Randolph voted, "Aye." The motion carried by a 5-0 vote.

Item #13. Adoption of Amendments to Required Recordkeeping for Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt of Contributions – Regulation 18421.1.

Executive Fellow Stephanie Dougherty explained that the purpose of this regulatory project is to establish clear rules regarding electronic contributions, as previous rules have largely existed in advice letters and campaign manuals. This was presented to the commission in pre-notice discussion in June. The proposed amendments to regulation 18401 would outline which records must be kept for a contribution made through electronic means. The proposed amendments to regulation 18421.1 would clarify when an electronic contribution is made or received. In the language discussed during pre-notice of regulation 18421.1, staff recommended that the electronic contributions should be considered or received when the candidate or committee obtains possession or control of the payment information or funds, whichever is earlier.

Ms. Dougherty advised that staff have made two changes to the proposed regulation 18421.1 language since the commission last reviewed the proposal in June. First, the "agent of the candidate or committee" language used in subdivision (c) has been added to subdivision (e) to ensure consistency between electronic and non-electronic contributions. In addition, staff modified the language to clarify that an electronic contribution is received when a candidate or committee obtains possession or has control of either the payment information or the funds. This language is consistent with the standards used for contributions made by check and then mailed to a committee. Just as a committee has received the contribution once the check is in its mailbox, a committee has received an electronic contribution once the payment information is in its computer inbox. If a committee decides not to retrieve its mail, it has control of the contribution and is using its discretion as to whether it will leave the contribution information in its mailbox; thus the committee has received the contribution. Any purposeful delay in reviewing contributions and reporting them could be considered a violation of the Political Reform Act (PRA). Staff recommends that the commission adopt the two proposed regulations in order to provide unambiguous rules for the record-keeping and disclosure of electronic contributions.

Commissioner Karlan asked whether the email itself needs to be kept or the information in the email, such as the cardholder's name, card number, and address, is to be kept because the email itself would have additional information about the timing of the contribution.

Commission Counsel Galena West responded that this issue is addressed at the bottom of page two. Staff tried to include the payment information, including an online contributor form, as part of what is required. Payment information would include the actual e-mail that was sent with the contribution information. If the credit card number was received through the email, then that email would need to be kept.

Chairman Randolph suggested adding language on page 3, lines 4-7 to include "or electronic mail."

Commissioner Karlan suggested changing it to say "original source documentation shall include any email in which this information is given to you." Otherwise the language requires the information but not the actual email in which it was sent.

Chairman Randolph commented that the language says "a record of the transaction created" which appears to include the document in which the credit card holder's name and information is found.

Ms. West said staff could clarify this at the end of line 7 by adding "and any emails pertaining to this information…"

Commissioner Karlan said yes, that this goes back to Commissioner Blair's concern from the last meeting. For example, someone says they will contribute $21,000 to a committee, so the committee knows it will be coming, but the committee says they received it on "date X," when it was actually received a few days earlier.

Ms. West suggested language to include at the end of line 7 "and any electronic mail notifications regarding this information."

Commissioner Karlan agreed with that addition.

In response to a question, Ms. West stated that an email without the specific credit card information would not constitute a payment for purposes of this provision. An email that simply says that someone would like to contribute $21,000, without any credit card information, is a promise to pay, not a contribution.

Commissioner Downey commented that the language already requires retention of the email in which the contribution information is sent. Line 3, page 3 includes "as well as any other information collected when debiting a contributor's account." This seems to include the actual email. Then, on line 6, the language "including a record of the transaction created and transmitted by the cardholder" would include the email. He asks whether the commission needs to add anything further.

Ms. West responded that it would be covered, but for clarity, it may be easier to apply if it were specifically noted.

General Counsel Luisa Menchaca suggested that keeping the regulation as currently worded may be better because distinguishing an email transaction may lead someone to assume that other transactions are not considered records or writings under this provision. The commission may want to say "including emails" as an example, rather than distinguishing emails separately.

Commissioner Karlan said that she would be comfortable with whatever language staff recommends which would ensure that the regulation includes the actual email. She wanted to make sure that that email is something that the committee would need to keep. If the original language does this, then she is supportive of it.

Chairman Randolph agreed that it is covered by the language "a record of the transaction created," assuming that the credit card information is in the email. She was concerned that people may assume that if the transaction is not a specific form, then it is not a record created, but she opined that the language makes this clear. She hypothesized that few people would send their credit card information through an email, so it is probably a fairly small issue.

Commissioner Downey moved to adopt the proposed regulations as written. Commissioner Blair seconded.

Commissioners Blair, Downey, Karlan, Knox, and Chairman Randolph voted, "Aye." The motion carried by a 5-0 vote.

Item #14. Adoption Discussion of "Has Reason to Know/Reasonable Diligence" Regulation (Re-Adoption of Regulation 18700.1).

Commission Counsel John Wallace explained that this item interprets the "reason to know" language of section 87100 of the Political Reform Act (PRA). This section prohibits a public official from participating and making or influencing a governmental decision in which the official knows or has reason to know that he or she has a financial interest. The PRA not only imposes a duty on the public official to disqualify from conflict-of-interest decisions but also imposes a duty on the official to use reasonable diligence to determine whether a conflict-of-interest exists. The proposed regulation was presented to the commission in May, and after responding to commissioners' comments and concerns, staff returns with a draft regulation for adoption.

Mr. Wallace explained that there are two versions of the proposed regulation: a simple version, version 1, and a more comprehensive version, version 2. The first version sets out two basic concepts. First, it provides that when a public official lacks information sufficient to apply the eight-step conflict-of-interest analysis, the official must make a reasonable, factual inquiry to determine if a conflict-of-interest exists. Secondly, version 1 clarifies that a public official may not delegate this responsibility to any third party. Version 2 includes these same provisions, but it also includes a list of examples of reasonable diligence, such as review of material prepared by the official's agency, review of materials prepared by this commission, requesting an opinion or advice letter, analyzing the conflict under the standard eight-step analysis, and reviewing other information the official may have on hand. Either of these would be helpful to the public, but

Mr. Wallace stated that staff believes that version 1 has fewer potential problems than version 2. Staff was concerned that officials could argue that they satisfied one of the listed requirements and feel that they have met the test, when the commission might say otherwise. Staff recommends adoption of version 1.

Commissioner Karlan said she found the last part of version 1 to be so circular as to be unhelpful because it attempts to define the word "reasonable" by using the word "reasonable" in its definition. She asked whether staff could hypothesize a case where one could argue that they satisfied all of the steps yet the commission would view them as not having complied, given that section 5 seems to be such a "catch-all."

Mr. Wallace responded that section 5 was developed to deal with situations where the public official had his own information about his economic interests. There is always a concern when putting out a list that the public will believe it is an exclusive list and that they must do nothing else except what is listed. The advantage on version 1 is that it is a general rule.

Commissioner Karlan questioned whether version 1 really tells someone what they are supposed to do by saying they should do what "a reasonably prudent public official" would do. She found version 2 more helpful because it lists examples of what a reasonably prudent public official would do as a minimum.

Chairman Randolph said she had the opposite problem with version 2 which is that the list implies that one might need to check off some of these examples, and some may not be as easy to check off than others. For example, one of the examples lists "reviewing relevant publicly available material prepared by the public official's agency." The material on any particular project could be quite voluminous, and if there is some little thing in one of the documents that may give rise to a conflict, Chairman Randolph questioned whether it should be the official's responsibility to pour through all of the supportive documentation for a map application, for example. Thus version 2 has some problems. While she acknowledged the concerns with version 1, Chairman Randolph said she sees value in approving it because it codifies some of the language that is used in the commission's advice letters. She is not sure it is truly necessary, though it may be helpful.

Commissioner Knox agreed with staff's rejection of version 2 and said that version 1 is not a sufficient advance over the language of the statute itself to warrant a regulation at all.

Commissioner Downey compared the language of the proposed regulation to that of telling a driver of a car how to drive non-negligently. Trying to define when one has "reason to know" is difficult and problematic.

In response to a question, Mr. Wallace explained the difficulty in trying to develop an effective regulation without harming the PRA, and therefore, arriving at these two versions was very difficult. These versions do not do more than set out policy. Mr. Wallace said he believes that staff would not be resistant to doing nothing on this issue today if that is what the Commission wishes.

Commissioner Karlan suggested ending the language of version 1 at line 8 and picking up at b in order to clarify the statute so that the official must exercise some diligence to investigate where they do not know about the conflict.

Chairman Randolph commented that it includes the concept that the duty is non-delegable and makes it clear that the official must not rely on someone else to make these determinations. This is one benefit of this version.

Mr. Wallace said he believed that the "non-delegable" provision is relatively well understood and would likely make no difference in the commission's operations.

Commissioner Knox suggested that by making certain duties non-delegable it may allow the argument that other duties are delegable.

Commissioner Blair asked whether this provision would protect a consultant who gives bad advice.

Commissioner Knox responded that he thinks that is a matter between an attorney and client and that this regulation would not apply to that relationship.

Chairman Randolph opined that she is comfortable with leaving the regulations as they are.

Ms. Menchaca advised that staff would prefer that a formal vote be taken because this issue has arisen in the past, and the commission's view would be helpful to staff.

Commissioner Knox moves to offer a resolution by the commission to thank the staff for its thoughtful work on this issue but declines to adopt either version 1 or version 2.

Commissioner Downey seconded the motion.

Commissioners Blair, Downey, Karlan, Knox, and Chairman Randolph voted, "Aye." The motion carried by a 5-0 vote.

Commissioner Blair commented that he thought examples mentioned on page 3 of the memo were logical examples and wondered whether non-lawyers who are candidates have a place to go to get examples of how to deal with a confusing issue like this. He said that he was struck by how the example on page 3 was helpful, and he questioned how one might deal with complicated questions like this to avoid the "should have known" problem.

Chairman Randolph mentioned that this example resulted from the official proposing a way to deal with his situation, asked for advice from the commission, and received confirmation from the commission that it was a good way to handle the issue.

Mr. Wallace added that the conclusion by the commission was also based on the facts of that particular situation, which is how staff prefers to deal with these questions. In addition, the

commission has a "Can I vote?" fact sheet on this matter. Some of these concepts and examples could be added to the fact sheet so that public officials can be made more aware.

Commissioner Blair added that not all elected officials have numerous staff and advisers. He would like to encourage the commission to ensure that examples and helpful information be made available for these individuals who may be trying to learn the rules on their own.

Item #15. Personal Loans (§ 85307) - Pre-notice Discussion of Proposed Amendments to Regulation 18530.8.

Commission Counsel Natalie Bocanegra explained that this item deals with subdivision (c) of regulation 18530.8, which provides that proceeds of a loan by a commercial lending institution do not count toward the personal loan limit of $100,000 imposed on candidates for elective state office under section 85307. Since the adoption of this regulation, there has been recent litigation and pending legislation on this issue. Thus, the commission is asked whether it would like to reconsider its interpretation of section 85307. Mainly, the question is whether subdivision (a) and (b) of section 85307 should be read together. The commission previously determined that this section was ambiguous, and, based on considerations of other provisions and definitions in the Political Reform Act (PRA) in addition to the statute's legislative intent, the commission decided that the two subsections should be read together. The result was that bank loans would not count toward the personal loan limit.

Ms. Bocanegra further explained that in January 2004, this issue was examined by Judge McMaster in *Camp v. Schwarzenegger*. This case challenged a $4 million loan that Arnold Schwarzenegger made to his campaign when he was a candidate for governor. In contrast to the commission's interpretation, Judge McMaster ruled that section 85307 was not ambiguous, and that proceeds from bank loans to a candidate do count toward the personal loan limit. Specifically, the court stated that the exception in section 85307(a) applies expressly to loans made to a candidate by a commercial lending institution. The court explained that on the other hand, section 85307(b) applies only to personal loans made by a candidate to his or her campaign for elective state office. The court's conclusion was based on the premise that the two subdivision are to be read independently and so differs with the commission's interpretation.

Ms. Bocanegra went on to say that subsequent to this decision, which was binding only on the parties involved, two separate pieces of legislation were introduced to codify Judge McMaster's decision. These two bills are addressed in the Executive Director's report. Considering all of this, the commission is asked whether it wishes to amend regulation 18530.8(c) to conform to the Camp decision, or wait to see what happens with the pending legislation. Staff recommends that the commission proceed with making a decision so that notice of the commission's decision could be provided to those who are subject to the rules of section 85307 and the commission's regulation. This was the first decision point, on which no public comment has been received.

Ms. Bocanegra discussed the second decision point, which also relates to the *Camp* decision. In that decision, the court also addressed whether the bank loan obtained by candidate Schwarzenegger was a loan that was governed by section 85307(a), and specifically, whether the

loan was one made to a candidate to a commercial lending institution in the lender's regular course of business on terms available to members of the general public. The court concluded that it was, despite the fact that only a small percentage of the public could actually take advantage of such terms due to their personal financial status. Ms. Bocanegra said that his analysis differs from the way the commission has interpreted similar provisions in the PRA, in particular, the terms "members of the public" in the context of determining income to an official. Staff believes that if bank loans are to be counted toward the personal loan limit, then the commission does not need to further define this term. However, if bank loans are not to be counted, as is the current rule, then further description would likely be warranted. These were the two decision points before the commissioners.

Commissioner Knox asked what would be left of section 85307(a) if the commission were to adopt the view of Judge McMaster.

Ms. Bocanegra responded that this subsection would apply all of the rules of the article to extensions of credit, so the commission would have to look at the definition of "extension of credit," which the commission currently does not have. The court said that all of the provisions in the article that related to contributions are now applied to extensions of credit.

Commissioner Karlan added that she would have read section 85307 as saying that the fact that one is a candidate does not stop him from, in other parts of his life, receiving commercial loans and not treating them as contributions. So, for example, if Governor Schwarzenegger is running for governor and he also decides to buy a house in Sacramento and goes to a bank for a $4 million loan under the kind terms the bank would give to anyone else with his assets, then that money coming from the bank as a loan would not count as a campaign contribution. But, if the money is funneled into his campaign, then the activity would be governed by subsection (b).

In response to a question, Ms. Bocanegra said that section 84216, relating to disclosure, excludes loans from commercial lending institutions from being considered a contribution. The interpretation that subsection (a) and (b) be read separately merely extends that concept to the rules that are provided under contribution limitations and makes it consistent with the disclosure rule.

Chairman Randolph said that Commissioner Knox's point is well taken to the extent that if a candidate wants to get a loan from a commercial lending institution, the candidate would argue that it is not a payment made for political purposes. She also agreed with Commissioner Karlan's interpretation of subsection (a).

Commissioner Downey commented that Commissioner Karlan's interpretation of subdivision (a) is the one that likely all five of the commissioners had three years ago, but then they were reminded by staff that the language in subsection (a) which begins "the provisions of this article regarding loans" referred to subsection (b) of 85307 and there were not other provisions of this article. As a result, the commission concluded that the exception carved out in subsection (a) applied to subsection (b). Commissioner Downey explained that this conclusion was not one that he liked, that instead the commission should have the kind of rule that Judge McMaster created. He said that unless we could have come up with some other application of subsection

(a), the commission was not the body to read it out of the statute; the Legislature is supposed to do that.

Chairman Randolph said that she read it in a way that contribution limits were not to apply. The wording is confusing, which is why the commission was correct in stating that the language is ambiguous. She said she thinks Judge McMaster's statement that it is not ambiguous is incorrect. However, in looking at the ballot and other materials, it appears that what they were trying to do was place a $100,000 limit on money that one could loan to his own campaign.

Commissioner Karlan explained that the language of subsection (b) is about loans to a campaign, whereas subsection (a) is about loans to a candidate. One way of reading this could be to say that loans to a candidate do not count because those loans are not going into the campaign. This would all be clear if the language of section 85307 said it "does not apply to loans made to a person who is a candidate." Then, it would be absolutely clear that there is this distinction. The ambiguity comes from the fact that the word "candidate" is used, rather than "person who is a candidate." It does not seem to turn section 85307 into nonsense to say that, when read together, the intent of this section is that a candidate should not be able to loan his campaign more than $100,000. But, if a candidate wants to take out loans to do something else, then this article has nothing to say about that situation.

Commissioner Downey added that the articles already say that the latter is okay under section 84216. He stated that he agrees with Commissioner Karlan and is ready to conclude that there is sufficient ambiguity, but he said he does not want it to go unnoticed that this is a statutory interpretation struggle. Commissioner Downey stated that he remains offended by Judge McMaster's analysis of the issue.

Chairman Randolph commented that this is a difficult and ambiguous statute and is not as obvious as the judge seemed to think it was. However, it is the correct interpretation that the $100,000 limit applies to funds that a candidate receives from a commercial lending institution.

Commissioner Downey clarified that this is pre-notice, and staff will come back in October with a regulation that would provide for a two-step analysis, including loans to a candidate and loans to a campaign.

Commissioner Blair added that a candidate can have as many personal loans as he wants to buy a house, a car, etc, while running as a candidate, but he cannot loan more than $100,000 to his campaign, even if the money came from a commercial lending institution.

Chairman Randolph asked if there was any input on decision point 2, regarding whether to further define "on terms available to members of the general public." She did not think it was necessary to make a decision on decision point 2.

Commissioner Karlan responded that as long as the money is not going into the campaign, then staff is correct that there is no reason to worry about it.

Item #16. Legislative Report.

Executive Director Mark Krausse said that the commission has supported SB 1449 (Johnson), which seeks to resolve the candidate loans question. Staff would like commission support on the Leno bill and that the commission identify it as the preferred approach.

Chairman Randolph added that Senator Johnson's bill maintains the ambiguous section, whereas Assemblymember Leno's bill rewrites the entire section.

Mr. Krausse agreed, saying that the additional paragraph in SB 1449 creates more interpretive problems than it solves, and there are other sections that address the questions of extensions of credit and the other issues addressed in (a).

Chairman Randolph clarified that on page 2 of the analysis, the strikeout of "subdivision (a)" is a typo, and that it should instead strikeout "subdivision (b)" and keep "subdivision (a)" or just leave it blank.

Mr. Krausse explained that SB 1353, a commission-sponsored bill, has been identified as a vehicle for a legislative fix to the problem with the Bay-Delta Authority and the question of whether federal employees serving on the Bay-Delta Authority are required to file statements of economic interest (SEI's). Commission staff is unable to advise that they do not have to file those SEI's. Those federal participants on Cal Fed have said that they will not file or participate until something else changes. Staff is seeking to make that change by carving out an exemption to say that those federal employees are not designated employees and are not required to file SEI's. This would apply to any agency on which a federal employee is serving in their official capacity, not just for the Bay-Delta Authority. Staff may be seeking urgency for this particular section of the bill, so that the problem may be solved earlier, but it may also be too late for the author to do this.

Mr. Krausse complimented Executive Fellow Stephanie Dougherty on her work for the commission. She will be leaving and will be missed, as will Sandy Johnson, who is going to work in the Enforcement division.

Item #17. Executive Director's Report.

Executive Director Mark Krausse mentioned that the commission received no line-item veto in the State Budget, so the commission will receive a cut of just $500,000. There is always a chance of mid-year budget cuts in November, but for now, the commission's cut was better than what was originally proposed.

Chairman Randolph added that the retirement party for outgoing Enforcement Chief Al Herndon and Associate Governmental Program Analyst Shirley Fong went well. They served the commission well over the last 20-plus years and will be missed greatly. Sandy Johnson will be taking Shirley Fong's position.

Item #18. Litigation Report.

General Counsel Luisa Menchaca explained that there has been legislation chaptered which addresses the issue in Evans and Walters, and thus the commission has filed for dismissal of those two cases. In addition, the oral argument for Santa Rosa is now scheduled for October 19 instead of August 18.

Commissioners went into closed session at 10:45 a.m.

The meeting adjourned at 12:35 p.m.

Dated: December 21, 2004.

Respectfully submitted,

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Whitney Barazoto
Commission Assistant

Approved by:

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Chair Randolph